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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/789,296	02/27/2004	Timothy A. Otterlee	R122 1020.2	7621
7590 D. Scott Sudderth Womble Carlyle Sandridge & Rice, PLLC P.O. Box 7037 Atlanta, GA 30357-0037	04/16/2007		EXAMINER VANAMAN, FRANK BENNETT	
			ART UNIT 3618	PAPER NUMBER
SHORTENED STATUTORY PERIOD OF RESPONSE 3 MONTHS		MAIL DATE 04/16/2007	DELIVERY MODE PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)
	10/789,296	OTTERLEE ET AL.
	Examiner Frank Vanaman	Art Unit 3618

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 31 January 2007.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-6 and 9-37 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-6, 9-37 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All b) Some * c) None of:
 - 1. Certified copies of the priority documents have been received.
 - 2. Certified copies of the priority documents have been received in Application No. _____.
 - 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) Notice of Informal Patent Application
- 6) Other: _____.

Status of Application

1. Applicant's amendment, filed Jan. 31, 2007, has been entered in the application. Claims 1-6 and 9-37 are pending.

Claim Rejections - 35 USC § 103

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 1-6 and 9-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson et al. (US 6,270,093) in view of McCue et al (US 6,513,817). Johnson teaches a cart arrangement having a utilitarian theme, including a molded plastic body portion (52) which defines a seat portion (40, 42, 44, 46) in at least one of which (42) a rider may sit facing forward (due to the space laterally of 40), a basket (4/8) fixedly attached to the body, and which may be made from a molded plastic material or a metallic material (col. 4, lines 49-50), the basket having first and second sides, as well as a bottom which is positioned forwardly of the seat, and wherein at least a substantial portion of the seat portion (e.g., 44, 46) is located above the height of the basket bottom, the seat portion including a rear wall (e.g., rearwardly facing portion of 46), left and right sides, and a front portion (note figure 5, forwardly of 40), the cart including a frame (18, 32) coupled to the molded body, and a plurality of wheels (pairs 12, 14, and 34). The reference to Johnson et al. fails to teach the molded portion as having a basket portion which receives a portion of the basket in a covering relationship. McCue et al. teach a shopping cart arrangement which includes a molded portion (23, 24, 25, 28) including both a seat portion (23, 24, 25) and a further portion extending longitudinally therefrom (28) having a pair of sides which cover at least a portion of the respective sides of a basket (12). It would have been obvious to one of ordinary skill in the art at the time of the invention to provide the molded portion (52) of Johnson et al. with a longitudinally extending further section which extends beyond the seat portion to cover at least a portion (e.g., the lower portions) of respective sides of the basket, as suggested by the longitudinally extending portion of the molded body of McCue et al., for the purpose of presenting a visually unified appearance (i.e., visual continuity

between the basket portion and seat portion), thus making the attachment look less like a retrofit.

As regards claim 9, the reference to Johnson et al., while teaching that the basket may be made from a metal, fails to explicitly teach wire mesh. Wire mesh is very old and well known as a material for shopping cart baskets, and it would have been obvious to one of ordinary skill in the art at the time of the invention to construct the basket taught by Johnson et al. as modified by McCue et al. from a wire mesh for the purpose of using a commonly available and traditional material for the basket.

4. Claims 12-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over McCue et al. (US 6,513,817, filed 2/20/2002; provisional filing 2/23/2001) and Struizer (US 5,704,527). McCue et al. teach a shopping cart having a theme-shaped, molded plastic body (note at least col. 5, line 40; col. 6, lines 59-60) integrally formed so as to define a seat portion (proximate 24, 26, 27) which includes a front section (proximate 31) and rear section (proximate 25), and at least two lateral sides thereof (e.g., proximate 36), and a basket section (proximate 28) having a front (end of 12, proximate 25) and rear (proximate 31, 20), the seat having a back (24) positioned such that an occupant faces the front portion of the seat section; a non-movable basket (12) being constructed from a wire material and having a bottom portion (e.g., bottom of 12) lower than at least an upper portion of the seat back, the basket being covered on lateral sides by a basket portion (e.g., at 28) of the body (compare figures 2 and 3), and positioned such that the basket front is proximate the front of the basket accommodating portion of the frame (e.g., 28, just rearwardly of 25), a frame (38) having at least 3 wheels (34/35) coupled thereto, further including a panel (40) coupled to the body, and taught to be mounted thereto, and as such understood to be demountable therefrom, which defines a front boundary of the seating portion, a rearward face of which faces the seating portion.

The reference to McCue et al. fails to teach the provision of one of an audio device comprising a radio receiver or internal broadcast receiver, a video display coupled to a VCR or disk player, or a video display coupled to an audio/video receiver.

Struizer teaches that it is old and well known to provide an entertainment device in the form of a radio, television, audio cassette player, CD player and/or video cassette player coupled to a wheeled transport vehicle such as a stroller. It would have been obvious to one of ordinary skill in the art at the time of the invention to provide the entertainment device suggested by McCue as an audio device or video device, as suggested by Struizer, for the purpose of providing entertainment which (a) may be reprogrammed (e.g., through the use of different pre-recorded media) or (b) which is more familiar (i.e., a popular video) to the rider.

As regards claims 20 and 21, the reference to McCue et al. as modified by Struizer is discussed in detail above and fails to teach the specific percentage of coverage of the basket by the side walls of the basket portion of the body. When a general condition is disclosed, it is not beyond the skill of the ordinary practitioner to adjust the degree of the condition absent any teaching to the contrary, and as such, it would have been obvious to one of ordinary skill in the art at the time of the invention to adjust the coverage of the basket by the side portions of the body from between 10% and 40% for the purpose of adjusting the amount of material required to construct the body, or for adjusting the outer side appearance of the overall cart.

Response to Comments

5. Applicant's comments, filed with the amendment, have been carefully considered. As regards the combination of Johnson et al. (hereafter "Johnson") and McCue et al. (hereafter "McCue"), applicant first sets out the perceived requirements for the establishment of a *prima facie* case of obviousness. Applicant asserts that the nesting operation taught by Johnson would be destroyed by a combination with McCue. Firstly applicant describes the nesting characteristic as being "the primary and very necessary function" the cart. The examiner does not agree. The primary function of the cart is to function as a cart, namely to allow the accommodation of items therein and to allow those items to be transported by a user. The examiner does agree that a nesting feature is important for many reasons which need not be enumerated here. Secondly, applicant asserts that various features taught by McCue prevent nesting. The examiner agrees, however, applicant may desire to revisit the office action's statement of

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rejection: wherein it is deemed obvious "to provide the molded portion (52) of Johnson et al. with a longitudinally extending further section which extends beyond the seat portion to cover at least a portion (e.g., the lower portions) of respective sides of the basket, as suggested by the longitudinally extending portion of the molded body of McCue et al." The examiner has not suggested the incorporation of the entire reference to McCue into that taught by Johnson (and indeed it is not clear how such a wholesale accommodation could be made), rather, it has been deemed obvious to longitudinally extend the molded portion of Johnson to cover a portion of the cart, and this was very specifically set forth in the previous office action. It is not clear how what was stated would constitute a substantial reconstruction, and indeed applicant has provided no evidence supporting the need of such a reconstruction.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Applicant's assertion that no motivation has been provided is noted, but not persuasive in view of the motivation being explicitly set forth in the office action.

As regards the combination of the references to McCue and Struizer, applicant first asserts that Struizer "does not appear to even show the actual electronic device", and with this statement, the examiner agrees. Applicant is reminded, however, that the electronic devices discussed in Struizer are very well known devices on their own, and Struizer does not claim to have invented any of them, as such, an explicit description of them is not required in Struizer's disclosure. Struizer does contemplate their incorporation, as can be determined from a cursory review of the abstract at lines 1-2 and 8-11, and at least in addition at col. 8, lines 25-28, and claim 10. As regards applicant's second assertion concerning Struizer and the ability of a child seated in the

stroller to see the entertainment device, this is not pertinent to the combination. Again with reference to the rejection set forth in the office action, it has been deemed obvious "to provide the entertainment device suggested by McCue as an audio device or video device, as suggested by Struizer". McCue already teaches an entertainment device, and already teaches it facing the seating area at a front thereof. Struizer teaches that it is well known to take entertainment devices of other types for mobile use. As regards the purported attachment of a carrying bag to the portion taught by McCue the examiner has suggested no such incorporation, rather Struizer is relied upon for a teaching that other entertainment devices may be used in a mobile manner, and the office action suggests only the provision of the entertainment device already taught by McCue as one of the other devices taught by Struizer, for the reasons set forth in the statement of rejection.

In response to applicant's argument that the references must explicitly provide a suggestion for combining, a conclusion of obviousness may be made from common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference (see *In re Bozek*, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969)), with skill being presumed on the part of the artisan, rather than the lack thereof (see *In re Sovish* 769 F.2d 738, 742, 226 USPQ 771, 774 (Fed. Cir. 1985)); further, references may be combined although none of them explicitly suggests combining one with the other (see *In re Nilssen* 7 USPQ2d 1500 (Fed. Cir. 1989)). It has long been the law that the motivation to combine need not be found in prior art references, but equally can be found "in the knowledge generally available to one of ordinary skill in the art." *In re Jones*, 958 F.2d 347, 351 (Fed. Cir. 1992) (citing *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988)).

The motivation to combine can be found either in a prior art reference, or it can be implicit in the knowledge of one of ordinary skill in the art. See *In re Huston*, 308 F.3d 1267, 1280 (Fed. Cir. 2002); *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 1472 (Fed. Cir. 1997).

Sources suggesting a combination may be: (1) the combined teachings of the prior art, (2) the knowledge of the ordinary practitioner and (3) the nature of the problem

to be solved. "The test for implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art." *In re Kotzab*, 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1317 (Fed.Cir. 2000).

In *Richard Ruiz and Foundation Anchoring Systems, Inc. v. A.B. Chance Company*, No. 03-1333 (Fed. Cir. January 29, 2004), the court emphasized that an "express written teaching in the art" to combine references was not required [emphasis added]. Rather, motivation may come from "the nature of a problem to be solved, leading inventors to look to references relating to possible solutions to that problem."

Please further note the following from Section 2144 of the MPEP: "The rationale to modify or combine the prior art does not have to be expressly stated in the prior art or it may be reasoned from knowledge generally available to one of ordinary skill in the art, established scientific principles, or legal precedent...The reason or motivation to modify the reference may often suggest what the inventor has done, but for a different purpose or to solve a different problem...It is not necessary that the prior art suggest the combination to achieve the same advantage or result discovered by Applicant." Also Chief Judge Nies writes in a concurring opinion, "While there must be some teaching, reason, suggestion, or motivation to combine existing elements to produce the claimed device, it is not necessary that the cited references or the prior art specifically suggest making the combination...In sum, it is off the mark for litigants to argue, as many do, that an invention cannot be held to have been obvious unless a suggestion to combine prior art teachings is found in a specific reference". See *In re Oetiker* 977 F.2d 1443, 24 USPQ.2d 1443 (Fed.Cir.1992).

The arguments of counsel cannot take the place of evidence in the record. *In re Schulze*, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965).

Conclusion

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within

TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

7. Any inquiry specifically concerning this communication or earlier communications from the examiner should be directed to F. Vanaman whose telephone number is 571-272-6701.

Any inquiries of a general nature or relating to the status of this application may be made through either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A response to this action should be mailed to:

Mail Stop _____
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450,
Or faxed to:
PTO Central Fax: 571-273-8300

F. VANAMAN
Primary Examiner
Art Unit 3618

